

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
November 14, 2008 Session

AGUSTIN PUGA v. LORIA SCARLETT

**Appeal from the Chancery Court for Rutherford County
No. 06-1846 CV Robert Ewing Corlew, III, Chancellor**

No. M2008-00289-COA-R3-CV - Filed December 16, 2008

Defendant appeals a jury's award of punitive damages, asserting that the trial court erred in its jury instruction on punitive damages. Defendant also appeals the trial court's inclusion of a truck as an asset of an LLC, asserting that the truck was owned by a necessary party who was never joined to the proceedings. Finding the chancery court's actions to be proper in both respects, the judgment is affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

RICHARD H. DINKINS, J., delivered the opinion of the court, in which ANDY D. BENNETT, J. joined. PATRICIA J. COTTRELL, P.J., M.S., not participating.

Brian O. Bowhan, Antioch, Tennessee, for the appellant, Loria Scarlett.

Thomas H. Castelli, Murfreesboro, Tennessee, for the appellee, Agustin Puga.

MEMORANDUM OPINION¹

I. Statement of the Case

Agustin Puga and Loria Scarlett were co-owners of Royal Furniture of Murfreesboro, LLC ("LLC"). On November 30, 2006, Mr. Puga filed a complaint in the Chancery Court for Rutherford County against Ms. Scarlett for breach of fiduciary duty and breach of contract; he also sought dissolution of the LLC. Mr. Puga later amended the complaint to include a claim for fraudulent

¹ Tenn. R. Ct. App. 10 states:

This Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated "MEMORANDUM OPINION," shall not be published, and shall not be cited or relied on for any reason in any unrelated case.

misrepresentation and punitive damages. The court appointed a receiver to investigate the assets of the LLC and to begin winding down the company. On May 7, 2007, Ms. Scarlett filed a counterclaim, asking that the LLC be wound down and alleging that certain assets were not property of the LLC

A jury trial was held on August 7 and 8, 2007. Mr. Puga asserted that furniture and a truck were property of the LLC, and that the truck's primary use was for the LLC. He presented evidence that the truck was used for picking up inventory, making deliveries to customers, and that it bore the LLC's logo. Ms. Scarlett and her husband ("Husband") testified that the truck was not LLC property, but was owned solely by Husband. The truck's title was never introduced into evidence at trial.

The jury was asked to determine whether Mr. Puga was entitled to compensatory damages, and, if so, how much; whether the furniture and truck were owned by the LLC; and whether Mr. Puga was entitled to punitive damages. The jury returned a verdict of \$32,439.50 in compensatory damages and found that the furniture and the truck were assets of the LLC.² The jury also found that Mr. Puga was entitled to punitive damages; at the punitive damage phase of the trial, the jury awarded Mr. Puga \$50,000. The court entered judgment consistent with the jury's findings.

Ms. Scarlett filed a Tenn. R. Civ. P. 59 Motion to Alter or Amend the Verdict; the motion was accompanied by an affidavit from Husband which stated that he was the sole owner of the truck and that he never conveyed it to the LLC. The court denied the motion.

II. Statement of the Issues

On appeal, Ms. Scarlett raises two issues:

1. Whether the trial court erred in its instructions to the jury on the issue of punitive damages.
2. Whether the trial court erred in entering a verdict which included the truck as part of the LLC's assets when an individual with an asserted ownership interest in the truck was never joined as a necessary party to the proceedings.

III. Standard of Review

When jury trials are involved, our task is to determine whether there is any material evidence to support the jury's verdict. *See Harper v. Watkins*, 670 S.W.2d 611, 631 (Tenn. Ct. App. 1983); *Lassetter v. Henson*, 588 S.W.2d 315, 317 (Tenn. Ct. App. 1979); *see also* Tenn. R. App. P. 13(d). Moreover, "we must take the strongest legitimate view of all the evidence to uphold the verdict,

² Ms. Scarlett does not contest the award of compensatory damages or the inclusion of the furniture as part of the LLC's assets.

assume the truth of all that tends to support it and discard all to the contrary. We are bound to allow all reasonable inferences to sustain the verdict, and, if there is any material evidence to support the verdict, we must affirm.” *Harper*, 670 S.W.2d at 631. We do not reweigh the evidence. See *Electric Power Bd. v. St. Joseph Valley Structural Steel Corp.*, 691 S.W.2d 522, 526 (Tenn. 1985).

Ms. Scarlett did not designate a transcript on appeal or a prepare a statement of the evidence pursuant to Tenn. R. App. P. 24, which requires an appellant to prepare “a transcript of such part of the evidence or proceedings as is necessary to convey a fair, accurate and complete account of what transpired with respect to those issues that are the bases of appeal.” Tenn. R. App. P. 24(b). Therefore, “[i]n the absence of a transcript or statement of the evidence, a presumption arises that the parties presented sufficient evidence to support the trial court’s judgment...” *Mfrs. Consol. Serv., Inc. v. Rodell*, 42 S.W.3d 846, 865 (Tenn. Ct. App. 2000).

ANALYSIS

I. Punitive Damage Jury Instruction

Ms. Scarlett first asserts that the chancery court’s jury instruction on the issue of punitive damages was in error because Mr. Puga raised three causes of action and there was no way of knowing under which theory the jury awarded the punitive damages. Mr. Puga argues that Ms. Scarlett never objected to the proposed jury instructions at trial, and therefore cannot claim that it was error on appeal. We affirm the jury’s punitive damage award.

Tenn. R. Civ. P. 51.02 states that “[a]fter the judge has instructed the jury, the parties shall be given opportunity to object, out of hearing of the jury, to the content of an instruction given or to failure to give a requested instruction...” Tenn. R. Civ. P. 51.02. Tenn. R. Civ. P. 49.02 states that “[t]he court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict.” Tenn. R. Civ. P. 49.02. Tenn. R. App. P. 36 provides that relief is not required to be granted to “a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error.” Tenn. R. App. P. 36(a).

Ms. Scarlett argues that since punitive damages are unavailable for some causes of action, the court erred in not instructing the jury to reveal under which claim it awarded punitive damages to ensure that the award was made under an appropriate theory of liability. Prior to instructing the jury, the court provided a copy of the instructions to each party for review; Ms. Scarlett made no objection at this time. Following the court’s jury instructions, Ms. Scarlett failed to object to the instructions as provided for under Tenn. R. Civ. P. 51.02. Finally, Ms. Scarlett failed to submit interrogatories to the jury asking them under which cause of action the punitive damages were awarded. Ms. Scarlett did not “take whatever action was reasonably available to prevent or nullify the harmful effect of an error.” Ms. Scarlett’s failure to prevent the alleged error at trial bars her from claiming error on appeal and seeking relief from an unfavorable verdict. The jury’s punitive damage award is affirmed.

II. Inclusion of the Truck in the LLC's Assets

Ms. Scarlett also asserts that the trial court erred in entering an order consistent with the jury's finding that the truck was an asset of the LLC when her husband, who she asserts was a necessary party to the proceedings, was never joined pursuant to Rule 19, Tenn. R. Civ. P.³ We find that any error caused by the alleged absence of a necessary party was preventable and that Ms. Scarlett's failure to prevent her asserted error at trial bars her from raising it as an issue on appeal. We also find that material evidence exists to support the jury's finding.

As stated earlier, relief will not be granted to "a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error." Tenn. R. App. P. 36(a). At trial, Ms. Scarlett made no motion to add her husband as a party and made no objection to the submission of the question of the truck's ownership to the jury in his absence. Both measures were reasonably available to Ms. Scarlett to avoid the error she asserts on appeal; her failure to take action against this asserted error bars her from seeking relief from its alleged harmful effect.⁴

Furthermore, Husband could have sought intervention pursuant to Rule 24, Tenn. R. Civ. P.⁵ Husband testified at trial as to his asserted ownership interest in the truck; Ms. Scarlett likewise testified that the truck was not an asset of the LLC.⁶ The question of ownership of the truck was then put to the jury. Husband was on notice that his asserted property interest in the truck was in jeopardy to be impaired or impeded. Ms. Scarlett cannot complain of or seek relief from a verdict which she alleges impaired her husband's property interest. Husband *chose* to remain a non-party to the suit in which the judgment was rendered. One maxim of the court of chancery holds that "Equity aids the vigilant, not those who sleep upon their rights." *Winters v. Allen*, 62 S.W.2d 51 (Tenn. 1933).

³ Tenn. R. Civ. P. 19, in part pertinent to this appeal, requires joinder "if (1) in the person's absence complete relief cannot be afforded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest..."

⁴ We make no determination as to whether Husband was a necessary party to the proceedings. Our ruling only addresses the threshold issue of whether the appealing party exhausted all reasonably available actions at trial to prevent the asserted error.

⁵ Tenn. R. Civ. P. 24.01 states:

[u]pon timely application anyone shall be permitted to intervene in an action...when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest...

⁶ Our references to proof at trial are gleaned from the briefs of the parties.

At trial, Ms. Scarlett, Mr. Puga, and Husband all testified and presented evidence regarding the ownership of the truck. The court then posed to the jury a question on the verdict form that asked if the LLC owned the truck. The jury found that the truck was an asset of the LLC. In the absence of a transcript of the proceedings or statement of the evidence, we presume that sufficient evidence exists to support the jury's findings and we do not find that the presumption has been overcome. The jury's verdict is affirmed.

CONCLUSION

For the reasons set forth above, the decision of the Chancery Court is AFFIRMED. Costs are assessed against Ms. Scarlett, for which execution may issue if necessary.

RICHARD H. DINKINS, JUDGE